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92-1373

NO. (1)

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

CARROLL M. NORRIS and JOHNNIE L. NORRIS,
PETITIONERS

versus

B.R. HARBIN, A/K/A BOBBY RAY HARBIN; BETTY FRANKLIN HARBIN; RONALD DEWAYNE JONES; DEBBIE YVONNE HARBIN JONES; MARGENE ALLRED and JAMES D. ALLRED

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF ALABAMA

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63 pp

QUESTIONS PRESENTED

1. Whether a decision of a trial court of Alabama, approved by and copied into the Opinion of the Supreme Court of Alabama, was so arbitrary and capricious as disregarding facts, incompletely stating circumstances, and not following stated principles of Alabama jurisprudence, as to be a denial of that due process guaranteed by the Fourteenth Amendment, United States Constitution.

2. Whether a decision of a trial court of Alabama, approved by its Supreme Court's not considering controlling aspects of Alabama law, has taken private property for a use not public in contravention of the provisions of the Fifth Amendment, United States Constitution, as the same is made applicable to Alabama by the due process clause of the Fourteenth Amendment, United States Constitution.

3. Whether a decision of a trial court of Alabama, approved by its Supreme Court's not considering controlling aspects of Alabama law, has taken private property, even for a public use, without payment of just compensation in contravention of the Fifth Amendment, United States Constitution, as the same is made applicable to Alabama by the due process clause of the Fourteenth Amendment, United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

CARROLL M. NORRIS and JOHNNIE L. NORRIS, by and through their attorney of record, FRED BLANTON, JR., petition the Court for a writ of certiorari to review the judgment of the Supreme Court of the State of Alabama in this case, which had an appeal and a cross-appeal.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama, Nos. 1910926 and 1911104, appears in Appendix A, infra, pp. A-1 thru A-11, and has not been reported. The judgment entered by the trial court is included by the Supreme Court of Alabama as part of its opinion at Appendix A, infra, at pp. A-5 thru A-10.

* All the parties in the Supreme Court of Alabama are listed in the caption.

JURISDICTION

The judgment of the Supreme Court of Alabama in each of these two appeals, 1910926 and 1911104, was entered simultaneously with the Opinion dated August 14, 1992. No.1910926 is at Appendix C, infra, at p. A-13. and No. 1911104 is at Appendix D, infra, at p. A-14. Application for Rehearing was timely filed on August 26, 1992, and denied on December 4, 1992, without opinion (Appendix B, infra, at p. A-12.)

The statutory provision believed to confer jurisdiction on this Court to review the judgments in question is Title 28, Section 1257(3), United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

A. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> Section 1.* * * nor shall any State deprive any person of life, liberty, or property, without due process of law;* * *

STATUTORY PROVISIONS OF ALABAMA

A. Section 11-52-2, Code of Alabama, 1975, enacted in 1935, provides in relevant part:

> (a) Any municipality is hereby authorized and empowered to make, adopt, amend, extend, add to, or carry out a municipal plan as provided in this article and to create by ordinance a planning commission with the powers and duties herein set forth.

B. Section 11-52-8, Code of Alabama, 1975, enacted in 1935, provides in relevant part:

> it shall be the function and duty of the commission to make and adopt a master plan for the physical development of the municipality,* * *
>
> Such plan * * * shall show the commission's recommendations for the development of said territory, including, among other things, the general location, character and extent of streets, * * * and other public ways * * *<u>or extension of any of the foregoing ways</u>, (Emphasis supplied).

C. Section 11-52-11, Code of Alabama, 1975, enacted in 1935, provides in relevant part:

> Whenever the commission shall have adopted the master plan of the municipality * * * no street * * * shall be constructed or authorized in the municipality* * *until the location,character and extent thereof shall have been submitted to and approved by the commission; provided, that in the event of disapproval the commission shall communicate its reasons to the council which shall have the power to overrule such disapproval by a recorded vote of not less than two-thirds of the entire membership;* * *
>
> The failure ***to act within 60 days of*** submission***shall be deemed approval.

D. Section 11-52-32, Code of Alabama, 1975, enacted in 1935, provides in pertinent part:

> (a) The planning commission shall approve or disapprove a plat within 30 days after the submission thereof to it; otherwise, such plat shall be deemed to have been approved, and a certificate to that effect shall be issued by the commission on demand; provided, however, that the applicant for the commission's approval may waive this requirement and consent to an extension of such period. The ground of disapproval of any plat shall be stated upon the records of the commission.* * *
>
> (b) * * *Approval of a plat shall not be deemed to constitute or effect an acceptance by the public of any street or other open space shown upon the plat.

E. Section 11-52-34, Code of Alabama, 1975, enacted in 1935, provides in pertinent part:

> The municipality shall not accept, lay out, open,improve,grade,curb or light any street or lay or authorize water mains or sewers or connection to be laid in any street within any portion of territory for which the planning commission shall have adopted a major street plan unless such street shall have been accepted or opened as or shall otherwise have received the legal status of a public street prior to the adoption of such plan or unless such street corresponds with a street shown on the official master plan or with a street on a subdivision plat approved by the planning commission or with a street on a street plat made by and adopted by the commission. (Emphasis supplied).
>
> The council may, however, accept any street not shown* * * on an approved subdivision plat; provided, that the ordinance or other measure accepting such street shall first

submitted to the municipal planning commission for its approval and, if approved by the commission, shall be enacted or passed by not less than a majority of the entire membership of the council or, if disapproved by the commission, shall be enacted or passed by not less than two thirds of the entire membership of the council. * * *

F. Section 11-52-36, Code of Alabama, 1975, enacted in 1935, provides in pertinent part:

> From and after the time when a planning commission shall have control over subdivisions as provided in section 11-52-31, the jurisdiction of the planning commission over plats shall be exclusive within the territory under its jurisdiction,* * *

G. Section 35-2-50, Code of Alabama, 1975, originally contained in the Code 1896, as Section 3899:

> Any person,* * *desiring to subdivide his lands into lots shall cause the same to be surveyed by a competent surveyor, if not already surveyed, and shall cause a plat or map thereof to be made,showing the subdivisions into which it is proposed to divide the same, giving the length and bearings of the boundaries of each lot and its number; and, if it is the purpose of the owner to divide the lands into town lots, such plat or map shall show the streets, alleys and public grounds and give the bearings, length, width and name of each street, as well as the number of each lot and block.Such plat or map must show the relation of the lands as platted or mapped to the government survey.

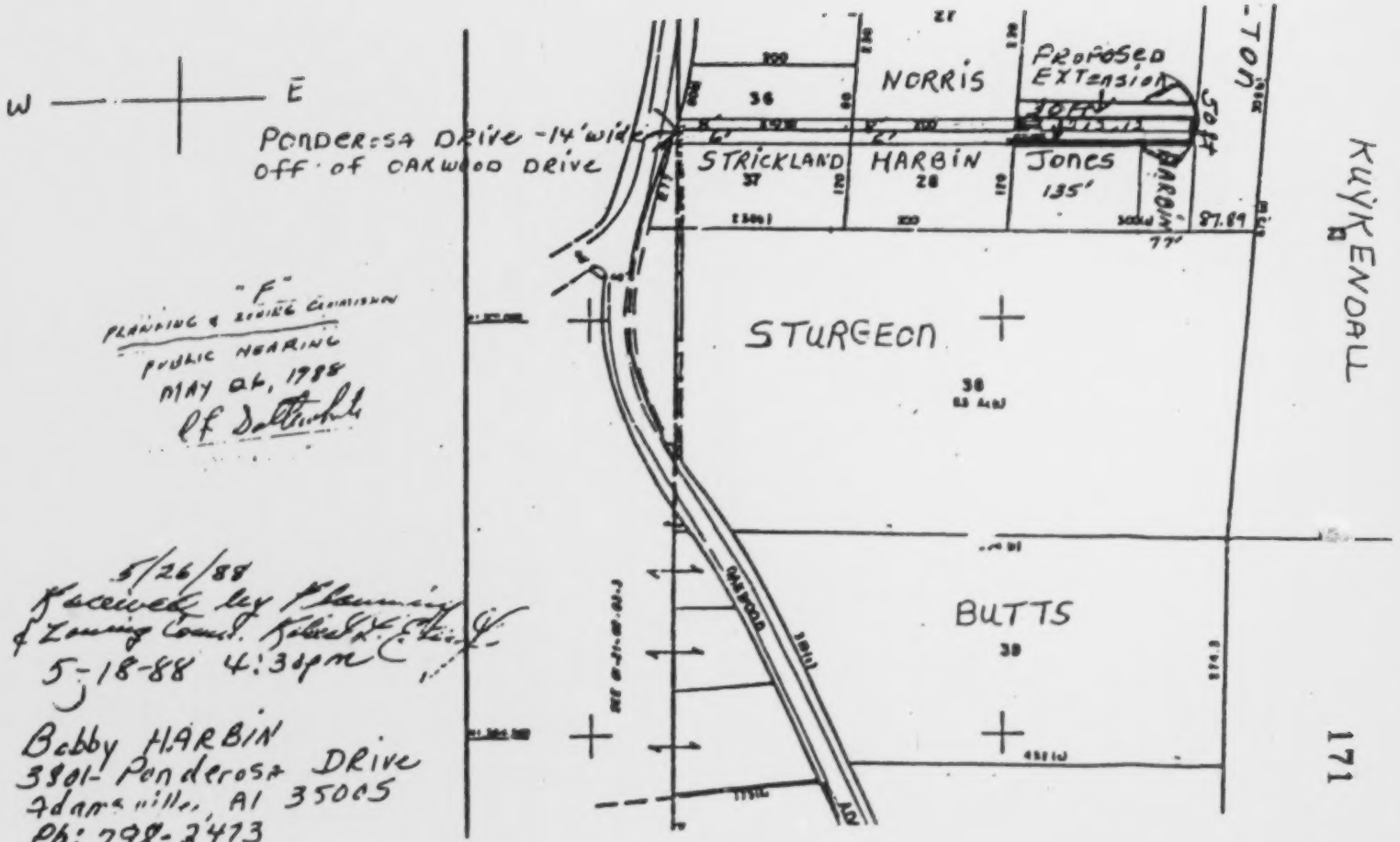
H. Section 35-2-51, Code of Alabama, 1975, originally contained in the Code 1896, as Sections 3900, 3901:

> (a) The plat or map having been completed shall be certified to by the surveyor, which certificate must also be signed by the owner,* * * and acknoledged by such owner* * *, in the same manner in which deeds are required to be acknowledged.***
> (b) The acknowledgment and recording of such plat or map shall be held to be a conveyance in fee simple of such portion of the premises platted as are marked or noted on such plat or map as donated or granted to the public, and the premises intended for any street, alleyway, common or other public use, as shown in such plat or map, shall be held in trust for the uses and purposes intended or set forth in such plat or map.

STATEMENT OF THE CASE

CARROLL M. NORRIS and **JOHNNIE L. NORRIS**, the petitioners here, live in Adamsville, Jefferson County, Alabama. They have lived in a house which they built shortly after buying property from the sister of the **HARBIN** respondents, and **HARBIN** lives directly across a way of access on an easement entirely on **NORRIS** property. Two depictions of the locale of this dispute which are in the Record follow. The first is an overall view, and the second is a critical exhibit presented to the Planning Commission of Adamsville. A word of caution is in order: THERE IS NO SIX (6) FOOT EASEMENT ON HARBIN PROPERTY AS SHOWN **ALTHOUGH BOTH COURTS BELOW APPROVED THIS AS BEING A FACT.**

N
ALLEY
454'
300'
363'
660.42'
Portcos Dove Line
SE Corner of NW 1/4, SE 1/4 Section 3, Tp 7 S., R 4 West



"F"
PLANNING & ZONING COMMISSION
PUBLIC HEARING
MAY 24, 1988
Pf Dalbright

5/26/88
Facsimile by Planning & Zoning Comm. Fabricated Etc. Inc.
5-18-88 4:30pm

Bobby HARBIN
3901 Ponderosa DRIVE
Adamsville, Al 35005
Ph: 798-2473

Since one aspect of the federal question involved here is a denial of due process occasioned by arbitrary and capricious decisions in total disregard of the facts, the facts must be shown as actually presented to the trial court and contained in the Record for appellate review. **HARBIN** purchased his property in August,1959, and built a house. **HARBIN** used a chert driveway to the West to what is now Oakwood Drive over what is now Strickland and Wiley property. To the East there was a fenced in pasture. The use made by **HARBIN** of the chert road was to access his carport, which was some 40 feet West of the fence. A **HARBIN** witness stated part of the 40 feet was used to back out. The chert driveway was very narrow, and this led to a dispute between **HARBIN** and the then owner of the Wiley property.

On December 27, 1963, SCOTT gave an 8 foot easement to **HARBIN**, stating:

> **The aforesaid easement for road and driveway purposes to the Adamsville-Docena Road,is for the use of all persons who may need same for ingress and egress.**(Adamsville-Docena Road is now Oakwood Drive.)

A similar easement was conveyed to **HARBIN** on May 2, 1964, by the then owner of the Strickland property with a width of 6 feet. Each easement was properly recorded.

To serve his residence **HARBIN had**, prior to the giving of the easements, installed a one-

inch gas service line by a private contractor. It must be presumed that permission was obtained by **HARBIN** to this placement. Also, he had installed a small water service line. Again, it must be presumed that permission was obtained. These service lines went to the mains in Oakwood Drive.

This was the situation when **NORRIS** purchased the property North of **HARBIN** from DAWSON, that is the two easements above did not go onto any property owned by HARBIN or DAWSON. In the deed of May 24, 1966, from DAWSON to **NORRIS** appears the following:

> Subject to the 8 feet easement across the south side of said property for a right-of-way to the Adamsville-Docena Road.[1]

During the construction of the NORRIS house, **NORRIS** contracted for a water line and agreed that **HARBIN** could share this service line. This service line went only to the West side of the NORRIS-HARBIN property. Obviously, this placement was permissive, and the testimony of the **HARBIN** witness contradicts any adverse connotation from the absence of any recorded easement by admitting during the late 1960's no easements were obtained. **HARBIN** shared with **NORRIS** his gas line.

---

1. NORRIS raised a question about this in a memoran- which appears at Record, pp.154-156 to the effect there was no conveyance to HARBIN, and, hence, the fee remained in Dawson, who would be an indispensable person. Neither Court addressed this question, and NORRIS did NOT argue an easement appurtenant as stated in the Opinions as approved.

After the utilities were in place, 1966-67, the chert road to the **HARBIN-NORRIS** properties was given a coat of surfacing, which,contrary to the sense of the Opinion, approved by both Courts, did NOT go to the eastern boundary of the **HARBIN-NORRIS** properties. The surfacing extended only to the **HARBIN** carport as his daughter testified, which was a distance of about 40 feet from the East line of the **HARBIN-NORRIS** properties. Any value in the Opinions about Jefferson County paving the way at the request of the City of Adamsville is lost since, as stated by County Engineer witness,it was standard practice to pave a private road on which there were two houses, the County presuming the way to be public! HOGAN, the witness, also stated MELBA TILL ALLEN called a halt to this practice in 1970.

Several years later, and certainly within any 20-year limitation period, **HARBIN** constructed a garage farther to the East on his property. At that time, and because he had some concrete left over, a concrete pad was poured at the East end of the surfacing of about 30 to 35 feet in length. There was still about 4 to 6 feet of sward toward the fence line. This occurred 10 or 12 years ago.

Also, the City did not arbitrarily lay this surface; the City did so with the knowledge of the persons affected.

It is noted also that **HARBIN** testified the surfaced portion of the drive was over 2 or 3 feet on his property in some places, that is, the maximum width of the surfacing is about 8 feet.

The Opinions note there was a sign placed at the intersection of Ponderosa Drive and Oakwood Drive. The Supreme Court of Alabama stated in Hereford v. Gingo-Morgan Park 551 So2d 918(AlaSupCt,1989) that describing a strip of land in dispute by a name such as "Ponderosa Drive" does not imply, in any way, that a public road exists. At p. 919, fn.1. This suggests that the Court was aware that the U.S. Postal Service required naming of most ways in Alabama.

A sign "Dead End" was installed at the intersection of Ponderosa Drive and Oakwood Drive,"presumably to inform members of the public travelling on Oakwood Drive that Ponderosa Drive came to an end and was not a link with any other road." This seems odd since BETTY HARBIN testified that they paid for the "Dead End" sign to keep people off Ponderosa Drive since children used it for a playground in front of her house.In a word, this was no action of the City of Adamsville, but a favor to a resident.

The street light placed by Alabama Power Company in 1968 received considerable attention from the trial judge and he stated such

placement and the paying of light bills was"evidence that the City of Adamsville considered Ponderosa Drive as a public road". On the contrary, the correct conclusion is that this was a way of doing a private favor and letting the City pay for it using a special rate. This light was placed in the yard of STRICKLAND to the west of HARBIN-NORRIS and not being on a claimed street right-of-way was not entitled to the special rate. It is also noted this was placed in the era of private favors by municipal officials, and the Mayor had been requested to install a light since it was very dark where the 14' easements stop and **NORRIS** turns off to reach their garage. MICHAEL F. HAWKINS of the Alabama Power Company testified about this. It must be presumed that officials of the City were aware that a light placed on private property would not qualify as a public street light.

The City of Adamsville after the initial surfacing did not perform any maintenance.

The Opinions states that "Ponderosa Drive reaches a dead end in line with the eastern boundary of the Harbin and Norris properties." The fact is the defined roadway used by automobiles does not extend to this boundary, as was admitted by **HARBIN.**

The Opinions state that "*** If Ponderosa Drive could not be considered a public road

because it does not have through traffic, then no dead end road could ever become a public street." **NORRIS** answered this proposition in a post-trial memorandum at Record 356-357, quoting Witherall v. Strane, 265 Ala 218, 90 So2d 251(1956), which approved the following:

> "***Although the mere fact that an alley is a cul-de-sac does not preclude it from being a public alley,Johnston v.Lonstorf, 128 Wis.17,107 N.W. 459, in order to establish the right of the general public to use such an alley, the proof must be very clear and satisfactory. Gilfillan v Shattuck, 142 Cal. 27, 75 P. 646."

This standard seems appropriate inasmuch as the evidence showed the roadway is more akin to an alley than a normal city street.

O.L. Satterwhite, City Clerk of Adamsville and custodian of records for that municipality states in an affidavit at Record,p. 23.

> "The City Map, and other pertinent records and documents of the City of Adamsville, do not show that 'PONDEROSA DRIVE' has been dedicated to the City and accepted by the City. This is not a 'public road' or 'public street' which is maintained by the City of Adamsville."

The Opinions state the fence on the **HARBIN-NORRIS** property line to the East "deteriorated with age and became nonexistent years ago." DAVID NULL testified for **NORRIS** and the video tape record No. 2 shows he answered a fire call to the pasture East of this line on February 17, 1984, a fence was

in place and he had to carry his hose across this fence(**NORRIS** Exhibit 10). NULL stated also this fence was five feet from the end of the surfacing.

The Opinions stated: "There is evidence that Ponderosa Drive was used for service personnel, deliveries, and garbage pickups." This use is not that of the "unorganized public" but permissive within the terms of the easements (See, supra, PP. 9 and 10). In CRW,Inc. v. Twin Lakes Property Owners, 521 So2d 939(AlaSupCt,1988), the Court was asked to affirm the proposition that a dedication could be shown by implied permission with evidence that fire, police, commercial, and utility vehicles regularly used the way without first obtaining permission. This was rejected and the Supreme Court of Alabama held that "such restricted permissive use*** did not amount to a dedication by the owners." Id.,at 942.

At the hearing on the **NORRIS** Motion for a New Trial, recorded on tape 3, the trial judge was asked specifically where there was any evidence of an intent to dedicate on the part of the property owners of the fee under the three easements involved here. The reply was emphatic that the dedication came from their not objecting to the installation of the light, the paving, etc., as above.

Witherall v. Strane, 265 Ala 218, 90 So2d 251(1956), cited above, considers another aspect of a dedication, which has been argued in both courts below, about the presence of the easements, the effect of the easements. Witherall holds recorded grants or easements put the grantees and the public on notice

> "that the owner did not intend to dedicate the strip to public use. If dedication to the public had been intended there would have been no reason for conveying to respondents the right to use the strip. They would have had that right as members of the public. *** The granting of a right of ingress and egress in and over said strip negatives and excludes the presumtion of an intention to dedicate the strip to public use."

In Alabama, the jurisprudence is quite clear that the intention to dedicate private property for public use must appear before there can be an acceptance of the claimed dedication. Witherall, supra,at 265 Ala,p.222, et seq., explains a dedication, thusly:

> "The intent to dedicate to the public use is the foundation of every dedication. And the burden of proving a dedication rests upon the party asserting it.*** 'Dedication is an affirmative act,and must be shown by affirmative evidence or its equivalent.If the acts and declarations are equivocal,they are not sufficient to establish dedication***The intent to dedicate must be shown by unequivocal acts upon which the public has a right to rely'. ***In Smith v.City of Dothan,supra[211 Ala 198],the rule was recognized 'that to establish a dedication the clearest intention on the part of the owner must be

shown,and that the evidence must be clear and cogent and the acts of the owner relied on to establish a dedication must be unequivocal in their indication of the owner's intention to create a public right exclusive of their own'"(Most citations are omitted and emphasis is supplied.)

The Supreme Court of Alabama in Witherall further approved the following excerpt from 16 Am.Jur.,Dedication,Sec.17,pp.361,et seq.:

"'***In any event the intention must clearly appear,and the acts and declarations of the owner relied on to establish it (dedication) must be convincing and unequivocal,indicating, expressly or by plain implication, a purpose to create a right in the public to use the property adversely to him and as of right.**The intention is to be ascertained from the acts of the owner,and not from the purpose hidden in his mind. Hence, it is necessary for the owner to do some act from which can be drawn a positive intent to dedicate the property to the public.

"The intention must be to appropriate the property to the general use of the public; and when the appropriation is for particular persons only and made under circumstances which exclude the presumption that it was intended to be for public use, a dedication will not be implied,as where the language used in a deed shows the intention to grant a private easement.'" (Emphasis supplied.)

With the exception of the controversy concerning a plat before the Planning and Zoning Commission of Adamsville, which was filed after the commencement of this action and was based upon a factual finding by the trial court that there was only an easement, these

were the "facts" upon which the Supreme Court of Alabama made this statement in its Opinion: **"We hold that there is a sufficient factual basis from which the trial judge could conclude that there has been a dedication of Ponderosa Drive as a public road."**

It is patent there was no dedication by acts from which can be drawn a positive intent to dedicate the property to the public! The other concept applied in Alabama is a legal fiction of a presumption of a dedication after the passage of the prescriptive period which in Alabama is 20 years. This prescriptive period presumption is told in Ayers v. Stidham, 260 Ala 390, 71 So2d 95 (1954). The elements are: (1) an open, defined roadway through reclaimed lands; (2) continuous use by the public as a highway; (3) without interruption for 20 years. The concurrence of these elements creates the rebuttable presumptive of a public way. Evidence that the use was permissive overcomes the presumption.

In this factual situation, Alabama law does not sanction a public road since as shown in Withrell,supra, and CRW,Inc., supra, the recorded easements for ingress and egress to now Oakwood Drive preclude adverse use since by nature the easements are permissive. No use has been shown in the facts to be adverse.

It is most apparent that **HARBIN** is trying to get a public street to furnish access to his lately acquired property to the East of the **HARBIN-NORRIS** fence line, but the paved portion of the easement does not extend to the fence line. Up until about 10 or 12 years ago the paved portion lacked about 40 feet of extending to the fence line, and there is no evidence in this Record that this hiatus was ever used so as to be "an open, defined roadway", particularly since there was a fence at the end of the easement and could not be "blocking" any imagined public street affording access to any property across the fence line. There was some evidence of pedestrian use of this 40 feet, but none about motorized vehicle use. Even though **HARBIN** did extend the surfacing (without Adamsville permission, if indeed there was a public street) with the concrete pad, there still remains a hiatus. It would appear that the facts do not support any prescriptive rights in the 40 foot hiatus based on 20 years of use as an "open,defined roadway".

Furthermore, **HARBIN** has argued that a 20-year prescriptive presumed dedication of a public way is not limited to the traveled part. As noted in Ayers,supra, one element is "an open,defined roadway", and clearly this does not mean an extended roadway since it would not be open and defined!

The Alabama law is stated in Grubbs v. Teale, 265 Ala 257, 90 So2d 768(1956), Headnote 5, at p. 258:

> "A highway established by user or prescription includes the traveled track and whatever land is necessarily used as incidental thereto for highway purposes, but this does not mean that the prescriptive right carries with it a right in the public to lay out and construct an extended highway."

It is submitted the foregoing, which has considered in addition to erroneous "facts" in the Opinions the absence of any determining principle or principles of law, demonstrates a strong prima facie case of a denial of due process in disregard of constitutional rights. Prior to discussing the constitutional facets it would be appropriate to complete the litigation background, starting with a consideration of the reference to a plat in the Opinions considered by the "Zoning and Planning Commission" which is stated to have been approved as an extension of Ponderosa Drive, and which the Courts took as evidence that the City of Adamsville considered it as a public road, based on Section 11-52-34, Code of Alabama, 1976.

The complaint filed in this case on January 19, 1988, sought to have **NORRIS** remove a fence which had been erected at the East end of the easement at or near the fence line. Although it is definitely unclear about an

claim of a public road being pleaded, testimony was heard in extenso on March 15, 1988, about the 8 foot easement on **NORRIS** property along with public road characteristics (such as those mentioned above). The trial court on March 28, 1988, entered its PRELIMINARY INJUNCTION of a mandatory nature requiring **NORRIS** "to remove any obstruction currently existing within the easement running along the southerly side of their property, which would have the effect of preventing **HARBIN** from ingress or egress to his property (to the East). Bond was posted by HARBIN and the fence removed. **NORRIS** appealed on March 30, 1988, but did not supersede with a bond. The injunction was overturned by the Supreme Court of Alabama on March 24, 1989 (R.123). This is reported as Norris v. Harbin, 541 So2d 486(AlaSupCt, 1989).

Only after this mandatory injunction was issued did **HARBIN** move forward with the house on the property to the East of the fence line. Exhibit 70 of **HARBIN** in the Record is conclusive that an EXTENSION OF AN EASEMENT was being sought to serve this property.

On April 21, 1988, the Planning and Zoning Commission took up the **HARBIN matter and the following is excerpted from the Minutes:**

"Chairman Ellis reported that Mr. B.R. Harbin of Ponderosa Drive had applied to

"the City Clerk for permit to construct a residential building on land which adjoins Mr.Harbin's property.***the City Clerk had referred said application to the Commission because of a lack of a dedicated public street which would adjoin the proposed construction site.Chairman Ellis explained that the applicant sought approval to use those certain easements which constitute Ponderosa Drive, to join with similar easement along the north side of the proposed construction site, for purpose of ingress and egress for the proposed structure.***proposed use of the existing easement(s) was opposed by Mr. and Mrs. Carroll M. Norris, owners of property adjoining said existing easement. Chairman Ellis explained that Mr. Harbin ***had obtained a Preliminary Injunction on March 28, 1988, restraining Mr. and Mrs. Norris from obstructing or preventing Mr. Harbin from egress or ingress,by way of the existing easement known as Ponderosa Drive, to the site in question. ***

"***Attorney Chamblee(Carl E. Chamblee,Jr.) explained said Preliminary Injunction was still in effect.***

"***Attorney Chamblee submitted a plot plan and legal description of two easements which reportedly would abutt(sic) and effectively extend the existing easements known as Ponderosa Drive, along the northern boundary of the site in question. ***.(Note that it was made known the CITY COUNCIL would have to accept and approve the proposed easements, if approved by Planning Commission,and certain improvements had to be made prior to any such acceptance as a public street. Further, the right-of-way and improvements would have to be deeded to the City.)

The fee to some or all of the proposed easements appear to be in **ALLRED** and not **HARBIN**!

This application was sent to the City Council without recommendation by a vote of 5 to 0, in favor. Thereafter, by letter of May 18, 1988,the Planning and Zoning Commission gave notice of a hearing on May 26,1988, to consider a proposed plat of **HARBIN** concerning,inter alia,certain street easements. The proposed plat shows once again an indication of a 6 foot easement on **HARBIN** property across from **NORRIS** property. Ponderosa Drive is NOT labelled as a public street and the "PROPOSED EXTENSION" does not state a public street was proposed to be extended.

The meeting of May 26,1988, considered the plat attached to the letter of May 18,1988, which,according to the minutes of this meeting had been presented by **HARBIN** on May 12, 1988,at the regular meeting. This plat showed the "extension" ending in a "dead end" at the East line adjacent to the HAMILTON property. **HARBIN** filed an amended proposed plat which appears at P.8,infra. Note that the "extension" ends in what appears to be a pseudo cul-de-sac. This abuts HAMILTON property and at the hearing he was in favor of the plat.[2]

2. NORRIS had indicated to the trial court that since the cul-de-sac could be re-surveyed and approved by Planning Commission to furnish HAMILTON with an exit to the West he should be a party. See Carroll v. Gardendale, No. 2900754, AlaCivApp. May 15,1992.

The following state the positions arrived at or discussed at this meeting:

A. The 6 foot easement on **HARBIN** property is not a duly recorded easement;

B. **HARBIN** would sell the sub-standard 77' lot shown to his daughter and son-in-law;

C. A portion of the existing pavement of Ponderosa Drive lies on both the supposed 6 foot easement and the supposed 8 foot easement in litigation;

D. **HARBIN advocated use of the paved portions of the two supposed easements as "public street right-of-way".**

WITHOUT OBJECTION FROM HARBIN ALTHOUGH THE MEETING WAS ADVISED BY THE CHAIRMAN OF THE PLANNING COMMISSION THAT THERE WAS A TIME LIMIT OF 60 DAYS FOR REVIEW AND ACTION, THE COMMISSION DEFERRED FURTHER ACTION UNTIL ADVISED BY LEGAL COUNSEL, or THE LITIGATION WAS CONCLUDED.**

On August 11, 1988, the matter of the **HARBIN** plat was again before the commission, without objection from **HARBIN** and also without any action for mandamus being filed by him to force a certificate of approval, this being his remedy otherwise by Alabama law. See, e.g., Boulder Corp. v. Vann, 345 So2d 272(1977); and Sigler v. City of Mobile, 387 So2d 813(1980).

Even if there be automatic approval, the

**Adamsville replaced its legal counsel later and was represented by new counsel during trial.

acceptance of any supposed streets is NOT automatic, see Cottage Hill Land Corp. v. City of Mobile,443 So2d 1201(AlaSupCt.,1983). THERE IS NOTHING IN THIS RECORD TO SHOW THAT THE CITY COUNCIL HAS ACCEPTED ANY PROFFERED DEDICATION, AS MAYOR ADAMS INDICATED, NOR HAS THERE BEEN ANY OTHER INDICIA OF PUBLIC ACCEPTANCE. FURTHERMORE, UNDER THIS POSITION THERE COULD BE NO EXTENSION OF PONDEROSA DRIVE SINCE THE PAVING AS STATED BY HARBIN DOES NOT EXTEND TO THE FENCE LINE TO CONNECT WITH THE PURPORTED EXTENSION ON THE EAST! **ANY APPROVAL AS CONTENDED FOR BY HARBIN WOULD BE A DEFINITE TAKING OF THE FEE BELONGING TO NORRIS WITHOUT COMPENSATION AND PROBABLY FOR A PRIVATE PURPOSE AS CONTRASTED WITH A PUBLIC ONE!**

It is more realistic to denominate the proceedings at this time as an agreed continuation of the May 26, 1988, hearing since **HARBIN** did participate without objection. The planning commission approved the plat of May 26, 1988, SUBJECT to the following stipulations:

1. Approval limited to "easements, right-of-way,*** (which were) part*** of original real property owned by Mrs. Margene R. Allred***October 20,1982;
2. Approval did NOT include any "lands, easements,right-of-ways***other than (those approved in 1.);

3. A cul-de-sac was to be provided for at the East end of the easement; the 30' easement for use for street and utility and drainage purposes was entirely on ALLRED property since the centerline of such easement was to be located at all points a distance of 135 feet north of southern property line of the original ALLRED property, which is 15 feet north of the north line of the **HARBIN-JONES** property line; this would not connect with any supposed 6 foot easement on **HARBIN** property; furthermore, the deed executed on September 14, 1988, from ALLRED to **HARBIN and JONES** grants ONLY a 24 foot easement north of the **HARBIN-JONES north** propery line, which is the southern property line of the original ALLRED property (R.473). The most that can be said is that **HARBIN** did not disagree with the stipulations, but DID NOT COMPLY. **THUS, EXHIBIT 16 of HARBIN at R. 474 IS A FALSE DEPICTION OF THE SITUATION, AND PONDEROSA DRIVE EASEMENT HAS BEEN SHOWN ON DRAWINGS SINCE THE MARCH 15,1988, HEARING AND REPEATED OVER STRENOUS OBJECTION WHICH WERE OVERRULED OR IGNORED! ALSO, THE CUL-DE-SAC SHOULD BE FURTHER NORTH ON ALLRED PROPROPERTY SINCE THE ENTIRE 30 foot EASEMENT ADJOINS ONLY THE NORRIS EASEMENT!**

4. Further, there is nothing in the Record which shows that **HARBIN** had eliminated the substandard 77 foot lot, and which he was required to deed to his daughter and son-in-law, which would have resulted in a legal lot 120' x 212'. In a word, this lot was NOT APPROVED.

5. Finally, the following appears:

> "7. that approval of the easement described aboved hereinabove shall not be construed to require title to said easement be conveyed to the City of Adamsville, not to require that easement be accepted and/or maintained by the City of Adamsville."

The foregoing has been set forth at great length to conclusively demonstrate that both courts in Alabama incorrectly concluded an extension was approved of Ponderosa Drive as being a "public street" and used this incorrect conclusion as a factor in holding Ponderosa Drive to be a "public street"; false representation about a 6 foot easement on **HARBIN** property since done over objection and with knowledge there was no such easement is clearly shown, and it must be concluded from the circumstances this was done intentionally and with intent to deceive and mislead the court(and the ploy seemed to have worked); it is patent this desire to have Ponderosa Drive a "public street" was basically and primarily for a private rather than a public purpose, and, hence could not

be done,especially without compensation,for otherwise this would be an illegal taking of the NORRIS fee under the 8 foot easement; and, finally, it should be obvious that the circuit court had no subject-matter jurisdiction over the streets of Adamsville and could not force Adamsville to accept Ponderosa Drive as a"public street" since jurisdiction over streets, and extensions thereof, has been placed exclusively in the municipality of Adamsville. See Code, Section 11-52-36, supra. The controlling principles in Alabama are that an absence of jurisdiction over the subject matter may be raised for the first time on appeal; jurisdiction over the subject matter cannot be created by waiver or consent; and in absence of jurisdiction over the subject matter the court has no power to act. See, e.g., B.F. Goodrich Co.v. Parker,282 Ala 151,209 So2d 647(1968)***

***This objection was contained in the NORRIS Motion for a New Trial,etc.(R.374)as to the jurisdiction over the"extension".It was not raised earlier since the complaint did present the equitable matter claim of obstructing an easement,which is, of course, a matter properly in the trial court. In an interlocutory,non-final ORDER of 9/17/90 (R.273,et seq.) the trial court stated that if Ponderosa Drive was merely an easement HARBIN could NOT use it to access the property to the East of the fence line, which is correct. But the trial court was incorrect in stating HARBIN had a right to extend Ponderosa if a public road, since this is within the exclusive jurisdiction of Adamsville, and if aggrieved by denial or stipulations the municipality can be taken to court to test the denial.

Two further matters remain which were for all practical purposes ignored though properly raised and argued in the trial court and on appeal.

NORRIS argued that since the trial court found no damages that **HARBIN** did not prove those special damages necessary for a private individual to sue to abate an obstruction to a public street. Of course, we have seen above that with the fence being removed in May, 1988, prior to the time of any approval, by passage of time or otherwise, there was never any public road to block, assuming arguendo there was a public street extension to block. Alabama jurisprudence is crystal clear such special damages are essential.See Roberts v. Mathews, 137 Ala 523(1902); Alabama Great Southern Railroad Co. v. Barclay, 178 Ala 124,59 So 169(1912); Osborne v. Cromeans,514 So2d 32(AlaSupCt,1987). The two cases cited by the Supreme Court in holding **HARBIN** had standing are from his brief on appeal, have been carefully read and understood, and have nothing to do with the public road situation we are concerned with here. This, it is submitted,is a callous disregard for the controlling law!

The motion in limine referred to in the Opinion was a final summary of objections about **HARBIN**'s being permitted to prove a public

road after having evoked a ruling from the trial court that he was entitled to a manda-tory preliminary injunction granting all the relief called for in his complaint, and there has been demonstrated above his requesting further action from the City of Adamsville by demanding certain relief based on the "ease-ments" on both sides of the fence line, and obtaining and his receiving, according to his own statements, favorable consideration. See Record, pp. 303, et.seq., which has memoran-da attached to it where the question of posi-tion preclusion with cogent analysis dated September 18, 1988, about estoppel to claim a public road in these circumstances, and an-other of July 24, 1989, which addressed other facets of the problem. The preclusion of in-consistent positions is recognized in Estop-pel and Waiver, 28 AmJur2d 296, et seq. This proposition is supported by Hodges v. Winston, 95 Ala 517, 11 So 200, which states:

> "***A defendant who, for the purpose of maintaining a defense, has deliberately represented a thing in one aspect, can not be permitted to contradict his own representation by giving the same thing another aspect in the same case***"

Wheeler v. Armstrong, 164 Ala 442, 51 So 268 (1900) supports this proposition, which goes beyond mere pleading inconsistent positions, which, of course, is permitted by the Alaba-ma Rules, Rule 8.

THE FEDERAL QUESTIONS ARE RAISED

Primarily, the essential federal question was raised in the **NORRIS** MOTION OF DEFENDANTS NORRIS FOR A NEW TRIAL AND OTHER RELIEF, predicated on the foregoing, and the motion is at P.373, et seq., of the Record on Appeal:

At Page 393,Ground 31,the following appears:

"31. The FINAL JUDGMENT results in a denial of that due process guaranteed by the due process clauses of Article I,Section 6,Constitution of Alabama, 1901,and the Fourteenth Amendment,Constitution of the United States."

Other statements in this motion follow:

"23K. The Court misconstrued the argument of the defendants NORRIS as to a cul-de-sac becoming a public road(p.5),***which argument was directed as to what is obtained by a prescriptive user, and a 'defined roadway' could not be proved unless there was traffic by motor vehicles to the boundary fence,especially when there was in existence an unused piece of sward approximately 4 to 6 feet showing absolutely no evidence of an 'open,defined roadway', since making a public road of the 4 to 6 feet(NB: As shown,the distance not used for 20 years is about 35 to 40 feet) would constitute taking without due process of the NORRIS property in violation

"of Article I,Section 6,Constitution of Alabama,1901,and the Fourteenth Amendment, Constitution of the United States,the sward being located on the NORRIS fee.***"

"23F. The Court erred in denominating Ponderosa Drive to be a public road from the eastern end of the concrete pad placed by HARBIN to the HARBIN-NORRIS boundary line contrary to the undisputed evidence since this would cause the FINAL JUDGMENT to be a taking of the property of defendants NORRIS without due process as guaranteed by Article I,Section 6,Constitution of Alabama, 1901,and the Fourteenth Amendment, Constitution of the United States.

"23C. The Court in its FINAL JUDGMENT imlicitly approved the width of Ponderosa Drive to be 30 feet since that was the width of the 'extension' of Ponderosa Drive shown on the HARBIN drawing submitted to the Planning and Zoning Commission, and it would be illogical for this Court to mean otherwise since an 8 foot easement, or public road of lesser width, could not otherwise be 'extended', and it is submitted that such a holding results in a taking of the property of NORRIS without due process of law in violation of the state and federal constitutions as heretofore set forth.

"23A. The Court in its FINAL JUDGMENT did

"define what the Court had found as Ponderosa Drive which causes the judgment to be so vague and uncertain as to be invalid as not giving the defendants proper notice in a due process sense, and thus denying them that due process guaranteed by Article I, Section 6, Constitution of Alabama, 1901, and the Fourteenth Amendment, Constitution of the United States. Contrast the facts here with those in **Fesperman v. Grier**, 294 Ala 163, 313 So2d 525(1975).

"11. The judgment of November 15, 1991, should be set aside and held for naught for the reason the conduct of Harbin,which inured to the benefit of the others included in the relief granted, described above in Grounds 8,9,and 10, was a pattern of misrepresentation tantamount to fraud,and this has denied defendants NORRIS a fair hearing being in violation of that due process guaranteed by Article I,Section 6, Constitution of Alabama,1901,and the Fourteenth Amendment,United States Constitution.

Here follow Grounds 8,9,and 10 which are incorporated in Ground 11, supra:

"8. The Court erred in its FINAL JUDGMENT (p.3) in stating as follows:

'***There are written instruments which appear to describe land occupied by Ponderosa Drive.These

'easements encompass portions of the Wiley property,Strickland property, Norris property,and Harbin property"

'INASMUCH AS THERE IS ABSOLUTELY NO WRITTEN EASEMENT WHICH HAS ANYTHING TO DO WITH THE HARBIN PROPERTY,AND HARBIN STATED UNDER OATH AT THE HEARING ON THE PRELIMINARY INJUNCTION ON MARCH 15,1988 (of which this Court can take judicial notice),THAT THERE WAS NO SIX FOOT EASEMENT ON HIS PROPERTY,AND"I'M NOT GIVING ANY EASEMENT ON MY PROPERTY.' (Empsasis supplied.)

"9.The Court erred in entering judgment for the HARBINS,and those who would profit by any action of HARBINS,including plaintiffs JONES, and defendants ALLRED,since HARBIN,successfully as noted in Ground 8 above, has misled consistently the Court from the time of the preliminary injunction hearing through the hearing in June, 1991, by various sketches, drawings, and other exhibits, to which objections were timely made but overruled, that there was and is a six foot easement on his west property to create a 14 foot easement from Oakwood Drive to the HARBIN-NORRIS boundary line.

"10. The Court erred in entering judgment for the HARBINS, and those who would profit by any actions of HARBIN, including plaintiffs JONES and defendants ALLRED, since HARBIN misled intentionally the Planning and Zoning Commission of the

"City of Adamsville that the width of Ponderosa Drive from Oakwood Drive to the east boundary of the HARBIN-NORRIS property was and is FOURTEEN FEET by submitting to the Commission a not-to-scale drawing,identified as Exhibit'F' to the Minutes of the Commission of May 26,1988, and further considered by the Commission on May 26,1988, when, in fact,which HARBIN could not help but know since he denied any easement on his west property, that was ONLY EIGHT FEET on the NORRIS property, this being about 200 feet or approximately one-half the distance from Oakwood Drive to the east HARBIN-NORRIS boundary line.

The trial court entered its ORDER OVERRULING MOTION FOR NEW TRIAL stating only "that there is a sufficient factual basis for concluding that there was a dedication of Ponderosa Drive as a public road as found by this Court in its final judgment in this case."(Record on Appeal, pp. 413-414, March 4, 1992.)

After the decision of the Supreme Court of Alabama handed down its decision on August 14, 1992, **NORRIS** filed an APPLICATION FOR REHEARING. in which the following appears at p. 5 thereof:

"The Adamsville planning commission could not legally and constitutionally in a due

process sense declare the easement on the NORRIS property to be 'a public street', for that would constitute a condemnation or taking without conpensation.**

At p. 12 of the APPLICATION FOR REHEARING timely filed appears:

"The plat of HARBIN-ALLRED property was approved on August 11, 1988.Over three years later, on November 15, 1991,the trial court and now this Court have approved a conclusion that,in fact,the City of Adamsville despite the evidence actually recognized that Ponderosa Drive was at that time a 'public road'. If that were true, then immediate legal action was called for***! Clients being denied the right to seek redress because of the three year and over delay have been denied that due process guaranteed by the due process clauses of the state and federal constitutions.***

"And, although NORRIS was notified of the proceedings about the plat, nonetheless,, NORRIS was not cast in an adversary position with notice that approval would recognize Ponderosa Drive as a 'public street' so that it is clear the due process constitutional rights, both state and federal of NORRIS were violated! Furmore, this would constitute a taking by

"the City without compensation, another state and federal constitutional violation.

Lastly, at p. 18 of the APPLICATION is this:

"***The court has relied on dedication proposition on which not authority can be found that a city can force a dedication by doing some acts prior to any offer to dedicate and then saying a failure to complain is really an unequivocal intention on the part of the fee owners to give this to the public and extinguish their own rights in and to the property. Many times the things done by the city at the request of a fee owner for the fee owner's convenience. To force a taking by acts to the city to which no objection is made is really a taking by that city without due process of law and without paying that constitutionally required value. Frankly,such a conclusion is repulsive to any sense of justice because it permits a city to do by indirection what it cannot do directly. And,it is submitted, this is the constitutional basis for requiring an UNEQUIVOCAL offer to dedicate before a city can accept that offer without paying money for compensation. And in this case the city has definitely never considered any of these acts

"as the acceptance of an offer to dedicate.***

The following appears at p. 20:

"The used portion of this(Ponderosa Drive) ends some 5 or 6 or more feet from the east end property line of HARBIN-NORRIS and to extend Ponderosa Drive to the line would definitely be a taking of property without due process of law,and Adamsville may be liable for damages.

On DECEMBER 4, 1992, the Supreme Court of Alabama overruled the application for rehearing, noting no opinion was written. See Appendix B, infra,at p. A-12.

REASONS FOR GRANTING THE WRIT

This case involves a situation where two courts have rendered decisions in a property case which can only be denominated as arbitrary and capricious since they are ones in practically total disregard of the operative facts and without determining principles of law all of which has resulted in serious violations of the NORRIS due process as guaranteed by the Fourteenth Amendment, and, also, a taking of property without paying compensation as a violation of the Fifth Amendment as the same applies to the State of Alabama by operation of the Fourteenth Amendment.

As the facts have shown, there is not very much actual real property involved as far as the **NORRIS** petitioners are concerned as the easement is only 8 feet by 200 feet,but it is very close to the front of their residence and has been used SOLELY for ingress and egress to their residence and that of respondents **HARBIN.** The maps at pp.7 and 8, infra, depict the relatively non-urban nature of the surroundings. A public street in front of the residence would be a taking of the fee, and, also, would lower the value of the residence greatly. It is also apparent that ALLRED, if he sub-divided the property to the North of the so-called "extension" of Ponderosa Road would have egress and ingress over his own property. HARBIN, then, is the ONLY person(with his daughter and son-in-law) who would benefit from the decisions in this case. This analysis then is: the taking is for a PRIVATE and not a PUBLIC purpose.

This case typifies a modern day discernible trend in courts practically in every state in the Union to favor plaintiffs, and, also in so favoring plaintiffs to usurp power and disregard facts and law in so doing.We are also aware of the unpleasant connotations stemming from jurists'receiving high campaign funds principally from lawyers and attorney interest groups.

While this does not arise from the Probate Court of Jefferson County, Alabama, which would have exclusive jurisdiction of a condemnation, nonetheless, the arbitrary and capricious decisions which decreed Ponderosa Drive to be a "public street"are equivalent to a probate court order of condemnation,and in any event are an exercise of State of Alabama power, and subject to constitutional limitations. This precept is: A taking by a state of the private property of one person, without the owner's consent for the private use of another is not due process of law and is a violation of the Fourteenth Amendment. See Missouri P.R.Co. v. Nebraska, 164 U.S. 403, 41 LEd 489, 17 SCt 130(1896).

If there were a statute permitting a condemnation by **HARBIN** over the **NORRIS** land, a condemnation would not be valid as a taking since it would not be for a public use. Compare and contrast, Clark v. Nash, 198 U.S. 361, 49 LEd 1085, 25 SCt 676(1905). Under the facts of this case at bar, only **HARBIN-JONES** could benefit, since, as noted, ALLRED already has access to his property, and this serves no public purpose as opening up new land for general use of the public would. Suffice it to say, Alabama does have a law granting to landlocked persons the right of condemnation on payment to acquire a right-of-way to a public road,but this would not be

available since it does not permit a person's curtilege to be taken, and **NORRIS** property is curtilege. Also, if **HARBIN** be landlocked he can obtain an easement of necessity from his vendors, the ALLREDS.

If the taking described could be denominated as for "public use", then it would still be unconstitutional since no compensation has been offered, ordered to be paid, or paid. Indeed, the Supreme Court of Alabama says **HARBIN** can claim damages, which is, in the facts of this case, merely adding insult to injury.

HARBIN said in the meeting of the Planning and Zoning Commission of May 26, 1988, supra, p. 23, that he advocated **USE OF THE PAVED PORTIONS OF THE TWO SUPPOSED EASEMENTS (ON NORRIS and HARBIN PROPERTY) as "PUBLIC STREET RIGHT-OF-WAY." IF THE ALABAMA COURTS RULED AS HARBIN HAS STATED, THEN THERE IS EITHER A 4 to 6 FOOT SWARD OVER WHICH VEHICULAR TRAFFIC HAS NOT MADE A DEFINED ROADWAY. OR IF REFERENCE IS MADE ONLY TO THE SURFACING PLACE BY ADAMSVILLE,THEN THIS GAP IS 40 feet! EITHER WAY THERE HAS BEEN A TAKING!** ((In Sam Raine Const.Co.,Inc.v.Lakeview Estates, 407 So2d 542(AlaSupCt,1961)(fn.1) the distance involved to separate property of plaintiff from the public road was 18 inches, and so argued as to prevent an extension.)) See Record on Appeal,pp.356-357 .

In summary, **NORRIS** is faced with the situation of having the Supreme Court of Alabama rubber stamp a decision of a trial court in an opinion which affirmed misstatements of facts, refused to even mention arguments on controlling Alabama jurisprudence, and compounded confusion by mixing contradictory principles of law as to a "dedication" and "a presumption of dedication by prescription" with the result NORRIS is not informed of where the mandated Ponderosa Drive lies on the ground so as to be a denial of constitutional due process.

If there has been a taking there has not been one for a "public use". See the discussion in Hawaii Housing Authority v. Midkiff, 467 US 229, 81 LEd2d 186, 104 SCt 2321 (1984).

Lastly, if a public use taking, there has not been just compensation paid or ordered.

Yes, the problem involved does seem not of too great importance except to **NORRIS. NORRIS deserves** that the vibrant issues in this involved case be resolved from a federal constitutional viewpoint and resolved as guidelines for future courts to study and follow. Such guidelines would be of utmost value to lawyers representing municipalities and persons living in the municipalities,especilly those who have tried to protect their abode from unwarranted intrusions.

CONCLUSION

The petition for a writ of certiori should be granted.

Respectfully submitted,

FEBRUARY, 1993 FRED BLANTON, JR.

APPENDICES

APPENDIX A

RELEASED
JAN 22 1993
CLERK
SUPREME COURT OF ALABAMA

OCTOBER TERM, 1992-1993

1910926

Carroll M. Norris and Johnnie L. Norris

v.

Bobby Ray Harbin, et al.*

1911104

B.R. HARBIN, a/k/a
Bobby Ray Harbin, et al.

v.

Carroll M. Norris and Johnnie L. Norris

Appeals from Jefferson Circuit Court
(CV-88-500-159)

On Rehearing Ex Mero Motu

SHORES, JUSTICE.

The opinion of August 14, 1992, issued in the case of Norris v. Harbin (1910926) is withdrawn, and this modified and restyled opinion is substituted therefor.

The case from which these appeals arise originated on January 19, 1988, when the

plaintiffs, Bobby Ray Harbin* and Betty Franklin Harbin, sued Carroll M. Norris and Johnnie L. Norris to enjoin interference with an easement along Ponderosa Drive, in Adamsville, Jefferson County, and sought to recover damages.[1]

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1 In the alternative, the plaintiffs sought to enjoin the defendants from blocking a public road.

The Norrisses had erected a chain link fence across Ponderosa Drive. The trial court issued a preliminary mandatory injunction on March 25, 1988, finding that the Norrises had interfered with easements and instructing them to remove the fence. The Norrises appealed to this Court. We reversed and remanded for a final hearing on a permanent injunction. Norris v. Harbin, 541 So2d 486 (Ala. 1989).

Various property owners along Ponderosa Drive then filed claims and counterclaims.

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* The correct style of appellees in 1910926 is as stated at Record, pp. 1, et seq., and Record, p.420, the complaint and Notice of Appeal, respectively, i.e., B.R.HARBIN, a/k/a Bobby Ray Harbin, et al. The Supreme Court is obviously incorrect. FB

In his order of September 17, 1990, the trial judge identified the parties[2] and defined the

2 The trial judge's order stated that Bobby Ray Harbin and Betty Franklin Harbin were plaintiffs in case CV-88-500-159, and that Carroll M. Norris and Johnnie L. Norris were defendants. Sarah F. Strickland was the plaintiff in case CV-89-1010 and was a defendant in case CV-88-500-159, along with Melvin L. Wiley and Marcie D. Wiley, Margene R. Allred and James D. Allred, and the City of Adamsville,also defendants. Previously,the plaintiffs had amended to add Ronald DeWayne Jones and Debbie Yvonne Harbin Jones as plaintiffs.

central issue of the case:"Harbin cannot prevail against Norris as a matter of law unless he proves that Ponderosa Drive is a public road."

The case was heard on that issue. The court entered a final judgment on November 15,1991, holding Ponderosa Drive to be a public road and permanently enjoining the Norrises from obstructing it. Defendants Norris and Sarah F. Strickland moved for a new trial. Plaintiff Harbin filed a motion to alter, amend, or vacate the judgment on the ground that the issue of damages was to be reserved for future determination. The trial court denied the motion for a new trial and did not address the issue of the reservation of damages. The Norrises appeal(1910926). The Harbins cross-appeal from that portion of the judgment denying damages (1911104).[3]

3. Defendants/appellees Margene Allred and James D. Allred,have filed a brief urging the Court to affirm the trial court's ruling that Ponderosa Drive is a public road.

The Norrises first question whether the Harbins have standing to bring this suit. We hold that they do,on the authority of Brown Mechanical Contractors,Inc.v.Centennial Ins.Co., 431 So2d 932(Ala.1983),and Ex parte Izundu, 568 So2d 771(Ala.1990). We next consider the Norrises' contention that the trial judge erred in overruling their motion in limine.[4] We have carefully considered the record in this case,and we find no procedural error on the part of the trial judge.Rule 8, A.R.Civ.P.

4.This motion sought to suppress any evidence submitted by the Harbins to establish that Ponderosa Drive was a public road. The Norrises argued to the trial judge that the Harbins must proceed on an easement theory, not a public road theory.

Finally, we consider whether the trial court erred in its finding that Ponderosa Drive is a public road.We hold that there is a sufficient factual basis from which the trial judge could conclude that there has been a dedication of Ponderosa Drive as a public road. We adopt as a portion of our own opinion the final judgment of the trial court holding that Ponderosa Drive is a public road and permanently enjoining the defendants[5] from obstructing it:

5. Carroll M. Norris, Johnnie L. Norris, Sarah F. Strickland,Melvin L. Wiley,Marcie D. Wiley, and the City of Adamsville.

"FINAL JUDGMENT

"This case has now been submitted for decision by this Court following an evidentiary hearing on the merits of the issues presented. Some of the facts involved in this case have already been discussed in earlier orders entered by this Court.

"The issue in this case concerns the use of a paved road known as Ponderosa Drive. The Harbins,Joneses,and Allreds contend that Ponderosa Drive is a public road. The Norrises, Sara(sic) Strickland and the Wileys say that Ponderosa Drive is not a public road. They say that Ponderosa Road is an easement appurtenant and that the right of ingress and egress over Ponderosa Drive is limited to the property owners whose lands are serviced by the easement and the invitees of those property owners.

"As this Court has stated in earlier orders, Ponderosa Drive has for many years served as a road providing access to four parcels of real property adjacent to the road: namely, the Wiley property; the Strickland property; the Norris property; and the Harbin property. Ponderosa Drive is the connecting road with each of these three(sic) parcels and Oakwood Drive, a public road in the City of Adamsville running north and south. Ponderosa Drive runs in an easterly direction from Oakwood Drive. Moving eastward along Ponderosa Drive from Oakwood Drive, immediately to the left on Ponderosa Drive is the Wiley residence and to the right is the residence of Sara(sic) Strickland. Past the Wiley and Strickland residences, the Norris residence is on the left, and the Harbin residence is on the right.

"Ponderosa Drive reaches a dead end in line with the eastern boundary of the Harbin and Norris properties. However, the Harbins wish to extend Ponderosa Drive further to the east so that Ponderosa Drive can also serve as a means of ingress and egress for a parcel of

"real property acquired by Harbin from Allred. That recently acquired parcel was divided into two parcels.The parcel adjacent to the harbin residence was conveyed by Harbin to his daughter and son-in-law,Debbie Yvonne Harbin Jones and Ronald DeWaune Jones. The parcel to the east of this parcel is still owned by Harbin.

"As noted in earlier orders,Ponderosa Drive, if extended further east,will service the two new parcels on the right and also service the property owned by Allred on the left.

"In 1959 Ponderosa Drive was a chert road.The four owners of the residences to which Ponderosa Drive is adjacent were using Ponderosa Drive.There are written easements which appear to describe the land occupied by Ponderosa Drive.These easements encompass portions of the Wiley property,Strickland property,Norris property,and Harbin property.

"Sometime in 1966 or 1967 Ponderosa Drive was paved with asphalt paving.This Court finds from the evidence that the paving of Ponderosa Drive was authorized by Jefferson County and carried out by employees of Jefferson County as the result of a request from the City of Adamsville to Jefferson County.

"The City of Adamsville caused its employees to fabricate and place a signal at the intersection of Ponderosa Drive and Oakwood Drive. This sign reads,'Ponderosa Drive.' and was placed at its location to identify Ponderosa Drive to occupants of vehicles travelling on Oakwood Drive.

The City of Adamsville also caused its employees to install a sign reading,'Dead End,' at the intersection of Ponderosa Drive and Oakwood,presumably to inform members of the public travelling on Oakwood Drive that Ponderosa Drive came to an end and was not a link with any other road.

"Both a water line and gas line are in place under the surface of Ponderosa Drive. The one-inch gas line is a service line installed by a private contractor acting for one of the own-

ers. However,it appears that the water line was installed by the public company. There is no recorded easement for either the gas or the water lines along Ponderosa Drive.

"In 1968, the Alabama Power Company installed a street light on Ponderosa Drive at the request of the City of Adamsville. Since that time, the City of Adamsville has paid the charge for the illumination provided by that street light. The City of Adamsville does not have legal authority to pay for electric power furnished to energize a street light located on a private road. The installation of the light and the payment by the City of Adamsville for the electricity used by that light is evidence that the City of Adamsville considered Ponderosa Drive a public road.

"Barbara Duchock, the City Clerk for the City of Adamsville, identified the Minutes of the Meeting of the Zoning and Planning Commission of the City of Adamsville held on August 11, 1988. At that meeting, the Zoning and Planning Commission approved a plat which showed a proposed extension of Ponderosa Drive to the new parcels owned by the Joneses and Harbin on the right and the property owned by the Allreds on the left.

"Counsel for the Harbins says that it would have been illegal under Sec.11-52-34, Code of Alabama 1975, for the Zoning and Planning Commission to have approved the extension of Ponderosa Drive if the same had not been legally recognized then as a public road.

"Counsel for the Norrises says in reply that the stipulation attached to the approval in the Minutes excluded Ponderosa Drive as a public road. The stipulation provides in part that approval of the plat was limited,'only to those easements, right-of-way, lots and parcels of property which constituted any part or portion of original real property owned by Mrs. Margene R. Allred and her spouse...' If at the time of the approval of the plat on August 11, 1988, Ponderosa Drive was a public road, the stipulation quoted above could not

"have changed its character. In any event, it would have been illogical for the Zoning and Planning Commission to approve a plat of a subdivision that it had reason to believe was landlocked. The approval of the plat is at least evidence that the City of Adamsville considered Ponderosa Drive a public road.

"Evidence was also presented concerning the manner of use made of Ponderosa Drive. Ponderosa Drive is a dead end street. It would be manifestly impossible for vehicles to use Ponderosa Drive as a means of access to streets other than Oakwood Drive, the one street to which it is connected. There is evidence that Ponderosa Drive was used for service personnel, deliveries, and garbage pickups. Furthermore, no limitations were ever placed on its use generally by members of the public such as persons out for a drive. There are no signs anywhere stating that Ponderosa Drive is a private road and not open to the public. If Ponderosa Drive could not be considered a public road because it does not have through traffic, then no dead end road could ever become a public road.

"In Osborne v. Cromeans,514 So.2d 32(Ala.. 1987), the trial court found that the road in question was a public road and enjoined and restrained all parties from interfering with the public's use of the road. On appeal, the supreme court affirmed. It found that there was evidence that the road was used as a service road; that the U.S. Postal Service had run its mail route over the road for many years; that the City of Scottsboro garbage pickup service had regularly operated along the road; that meter readers and other utility service personnel regularly used the road; that it was used by a gas supplier for his butane gas trucks. The supreme court also noted that there was undisputed testimony that the men, machinery and materials of the City of Scottsboro were used to prepare the road for paving and that the paving was paid for by the Cromeanses and other abutting owners, except Osborne, as was often

"the practice in Scottsboro in order to get travel roads paid(sic).A standard City of Scottsboro street sign had been installed at the intersection of the road with the county park road, with the name shown as 'E Ridge Rd.'

"The opinion in Osborne v.Cromeans, supra, attached a map showing the private road which had been found to be a public road by the trial judge. The private road in question in that case was a circular private road which only served five or so residences. The supreme court concluded that the evidence presented supported the trial court's finding that the road had achieved a public character:

> "'It is well settled law in this state that, "an open, defined roadway in continuous use by the public without let or hindrance for a period of twenty years becomes a public road by prescription." West v. West, 252 Ala. 296, 4 So.2d 873 (L949). After a prescription has been shown, the burden is then on the landowner to show permissive use only in recognition of his title, and his right to reclaim possession. West v. West,supra.
>
> "'After examining the record in this case we are of the opinion that the trial court was authorized to find that the disputed road was an open, defined roadway, through reclaimed land, in continous use by the public without let or hindrance for a period of more than twenty years; therefore, the judgment of the trial court is due to be, and it hereby is, affirmed.'
>
> "Also see,e.g., Powell vs. Hopkins,288 Ala. 466, 262 So.2d 289(1972); Sam Rain (sic)Constr. Co.v. Lakeview Estates, Inc., 407 So.2d 542 (Ala.1981).'

"The defendants have also argued that there was evidence that there was a fence dividing the Harbin old property and therefore blocking the extension of the public road.This fence deteriorated with age and became nonexistent years ago. Furthermore, the fence merely de-

"fined the old boundaries of the property. There is no evidence that the fence line was ever established as a means of blocking the road but merely showing that the road went no further at the time.

"In accordance with this opinion, it is hereby declared that Ponderosa Drive, from its connection with Oakwood Drive and continuing to the part of Ponderosa Drive shown on the plat submitted to the City of Adamsville is a public road.

"The defendants, Carroll M. Norris, Johnnie L, Norris, Sara(sic) F. Strickland, Melvin L. Wiley, Marcie D. Wiley, and the City of Adamsville are hereby permanently enjoined from obstructing Ponderosa Drive at any point throughout its length or any extension of its length.

"All costs of court incurred in this case are hereby taxed against the defendants, Carroll M. Norris, Johnnie L. Norris, Sara(sic) F. Strickland, Melvin L. Wiley and Marcie D. Wiley."

Vestavia Hills Board of Education v. Utz, 530 So.2d 1378 (Ala.1988); CRW,Inc. v. Twin Lakes Property Owners Ass'n.,Inc., 521 So.2d 939(Ala.1988).

We also consider the Harbins' cross-appeal from the denial of damages. The Harbins contend the trial court had planned to try first the issue of the existence of a public road and that it had specifically reserved the issue of damages for a seconbd trial. We have examined the videotape record and find that, in the hearing on the Harbins' motion, the trial judge expressly stated that he had forgotten that he had reserved the issue of damages for a later trial and that he would

vacate that he had forgotten that he had reserved the issue of damages for a later trial and that he would vacate that portion of the final judgment denying all claims for damages. However, he failed to do so. Therefore, it appears that the court may have denied damages without having actually considered the question; we reverse that portion of the judgment relating to damages, and we remand the cause to the trial court to consider the issue of damages.

OPINION OF AUGUST 14, 1992, WITHDRAWN, AND MODIFIED AND RESTYLED OPINION SUBSTITUTED, EX MERO MOTU; AFFIRMED AS TO THE PERMANENT INJUNCTION (1910926); REVERSED AS TO THE ISSUE OF DAMAGES (1911104).

Hornsby, C.J., and Maddox, Adams, Houston, Steagall, Kennedy, and Ingram, JJ., concur.

APPENDIX B

THE STATE OF ALABAMA-----JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA
December 4, 1992

1910926

Carroll M. Norris and Johnnie L. Norris v. Bobby Ray Harbin, et al.
(Jefferson: CV-88-500-159)

NOTICE

The application for rehearing filed in this case is overruled. No opinion written on rehearing.

SHORES,J. - Hornsby, CJ., Maddox, Adams, Houston, Steagall, Kennedy and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as the same appear(s) of record in said Court.

Witness my hand this 4th day of December, 1992.

s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX C

THE STATE OF ALABAMA.....JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

August 14, 1992

1910926

Carroll M. Norris and
Johnnie L. Norris

v.

Bobby Ray Harbin, et al.

Jefferson Circuit
Court
CV-88-500-159

CERTIFICATE OF JUDGMENT

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the court below is affirmed in part and reversed in part in accordance with the opinion issued this day in this cause.

IT IS FURTHER ORDERED that the costs of appeal be taxed one-half to appellant(s) and one-half to appellee(s).

OPINION BY SHORES, J,

Hornsby, CJ., Maddox, Adams, Houston, Steagall, Kennedy and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as the same appear(s) of record in said Court. Witness my hand this 22 day of Jan. 1993.

s/ Robert G. Esdale
Clerk, Supreme Court of
Alabama

APPENDIX D

THE STATE OF ALABAMA.....JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA
August 14, 1992

1911104

B.R. Harbin, a/k/a
Bobby Ray Harbin, et al.

v.

Carroll M. Norris and
Johnnie L. Norris

Jefferson Circuit
Court
CV-88-500-159

CERTIFICATE OF JUDGMENT

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the court below is affirmed in part and reversed in part in accordance with the opinion issued this day in this cause.

IT IS FURTHERED ORDERED that the costs of appeal be taxed one-half to appellant(s) and one-half to appellee(s).

OPINION BY SHORES, J.

Hornsby, CJ., Maddox, Adams, Houston, Steagall, Kennedy and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as the same appear(s) of record in said Court. Witness my hand this 22 day of Jan. 1993.

s/ Robert G. Esdale
Clerk, Supreme Court of
Alabama

STATE OF ALABAMA

COUNTY OF MONTGOMERY

I, Robert G. Esdale, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing, consisting of 12 pages, (The preceding transcripts on pages A-1 thru A-14) are true and correct copies of the opinion, the notice overruling the application for rehearing and the certificates of judgment in cases 1910926, Carroll M. Norris and Johnnie L. Norris v . Bobby Ray Harbin, et al. and B.R. Harbin, a/k/a Bobby Ray Harbin , et al. v. Carroll M. Norris and Johnnie L. Norris.

(SEAL OF THE SUPREME COURT OF ALABAMA)

Witness Robert G. Esdale, Clerk of the Supreme Court of Alabama, with the Seal of the Court attached, at the Judicial Department, this the 22nd day of January, 1993.

s/ Robert G. Esdale
Clerk of the Supreme
Court of Alabama